# In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 957

SAMUEL H. WISSNER, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS*

## MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner, a veteran, was dismissed from his civilian employment as a Contract Specialist for the Department of the Army on the ground that he had "solicited and accepted gifts, favors, and gratuities and entertainment from the contractor which at the time thereof was engaged in procurement activities and transactions" with petitioner's office. His removal was sustained by the Civil Service Commission after a full hearing before an Appeals Examiner. Petitioner brought this suit in the Court of Claims to recover back pay and other damages occasioned by his discharge, contending that the discharge was procedurally defective. The Court of Claims dismissed his suit on the ground that there were no procedural



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errors affecting his rights. There is no merit to any of petitioner's present contentions, and no occasion for review by this Court.

1. Petitioner's argument that he was denied the right to confront and cross-examine several witnesses at the hearing held to review his removal is totally without merit. The Court of Claims noted that neither petitioner nor his attorney "made any effort to obtain the testimony of [these witnesses] * * *, nor * * * ever requested the Civil Service Commission, or the Army, to make these persons available for examination" (Pet. App. 12–13).[1] It is well settled that, under the regulations applicable to the removal of a veteran's preference eligible from a Civil Service position, an employee who desires the presence of witnesses at his hearing must show that he "discharged his initial burden * * * by making timely and sufficient attempt to obtain their presence" and that "proper and timely demand was made" upon the agency involved so that the witnesses might be requested to attend. *Williams* v. *Zuckert,* 372 U.S. 765, 371 U.S. 531, 532; *Brown* v. *Zuckert,* 349 F. 2d 461 (C.A. 7), certiorari denied, 382 U.S. 998; *McTiernan* v. *Gronouski,* 337 F. 2d 31 (C.A. 2); *Studemeyer* v. *Macy,* 228 F. Supp. 411, affirmed *per curiam,* 345 F. 2d 748 (C.A.D.C.), certiorari denied, 382 U.S. 834.

2. Equally without merit is petitioner's contention that his constitutional rights were infringed because part of the evidence against him consisted of the reports of F.B.I. agents who had listened in on a

[1] Two witnesses whom petitioner's counsel asked the Army to produce did testify at the hearing. Pet. App. 12.

conversation during which petitioner asked a government contractor whose vouchers he was processing to supply him with liquor. The F.B.I. agents listened to the conversation at the request of the contractor (who had placed the calls to petitioner) on an extension telephone in the contractor's office. The Court of Claims properly held that "this contention is disposed of adversely to plaintiff" by *Rathbun* v. *United States*, 355 U.S. 107, where this Court held that 47 U.S.C. 605 is not violated when either party to a telephone conversation permits another to listen to a conversation on an extension telephone. *Rathbun* surely applies here, for the interception was "authorized by the sender," *i.e.*, by the party who had placed the calls.[2]

3. Petitioner's final contention is that the Court of Claims erred in disregarding his defense of entrapment and in denying the request for rehearing in which the claim was raised. Assuming *arguendo* that entrapment is a valid defense to a removal action, petitioner was required to assert that defense at his hearing. He did not make any motion based on that defense nor did he raise it before his petition for rehearing. Moreover, the F.B.I. agents did nothing whatever to induce petitioner to incriminate himself. They merely listened in on a conversation

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[2] *United States* v. *Tane*, 329 F. 2d 848 (C.A. 2), upon which petitioner relies, is not to the contrary. That case holds only that both the sender and the receiver are entitled to the protection of 47 U.S.C. 605, not that the permission of both is needed before overhearing on an extension telephone may be permitted.

in the course of which petitioner, on his own initiative, asked a government contractor to furnish him with liquor.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
*Solicitor General.*

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